

1 **ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**

2 **2340 W. Ray Road, Suite 1**

3 **Chandler, Ariz. 85224**

4 **(480) 812-1700**

5 ***JOHN A. CANBY, SB#010574***

6 ***DAVID J. EUCHNER, SB#021768***

7 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

8 In the Matter of:

) No. R-09-0036

)

)

9
10 Petition to Amend Rules 35.1 and 35.4,
11 Arizona Rules of Criminal Procedure

) **COMMENT TO PETITION TO**
) **AMEND RULES 35.1 AND 35.4,**
) **ARIZONA RULES OF CRIMINAL**
) **PROCEDURE**

)

)

)

15
16 ¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona
17 Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to
18 the above-referenced petition. AACJ is a not-for-profit membership organization
19 representing four hundred criminal defense lawyers licensed to practice in the State
20 of Arizona, as well as law students and other associated professionals, who are
21 dedicated to protecting the rights of the accused in the courts and in the legislature.

22 ¶2 AACJ opposes the above-referenced rule change petition because its
23 implementation will result in motions being granted in spite of the legal or factual
24 merits of those motions. The petitioner notes significant differences between the
25 rules of civil procedure and criminal procedure regarding how trial courts should
26 deem a failure to respond to a motion. Rule 7.1(b) of the Arizona Rules of Civil
27 Procedure requires the trial court to find non-compliance with the rule equivalent
28 to consent to the opposing party’s position. Rules 35.1 and 35.4 of the Arizona

Rules of Criminal Procedure, however, do not similarly penalize litigants for failure to comply with the letter of the rule.

¶3 Without commenting on the wisdom of the civil rule, AACJ believes that the Petitioner's suggestion for alteration to the criminal rules will ultimately hurt many criminal defendants. Undoubtedly, this rule change petition was intended to force prosecutors to respond in writing to motions. Defense lawyers are indeed frustrated by the routine practice of prosecutors who fail to timely respond to motions, or even respond at all, but who appear for oral argument on the motion and make generalized citations to "the case law" without even citing a case. This practice needs to be corrected.

¶4 However, on some occasions, defense attorneys, especially public defenders who are burdened by extremely onerous caseloads, fail to respond in writing or in a timely manner to a motion filed by a prosecutor. If this rule change were to go into effect, the trial court would have broad discretion to decide motions based on form rather than on substance. Criminal defendants, unlike civil litigants, have the fundamental right to effective assistance of counsel, and for this reason the rules for civil litigants do not necessarily apply equally to the rules for criminal defendants. AACJ is concerned that if this Court grants the rule change petition, then inevitably material issues will be decided against the interests of criminal defendants regardless of the merits of the parties' positions, which in turn will result in an increase in the granting of petitions for post-conviction relief due to ineffective assistance of counsel.

¶5 AACJ does not dispute that Rules 35.1 and 35.4 should be modified in such a manner that requires counsel to comply with the rules for responding to motions. Nevertheless, this particular rule change petition is likely to have unintended consequences that will be to the detriment of criminal defendants.

¶6 For that reason, AACJ respectfully requests this Court to deny the
petition.

DATED: May __, 2010.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
John A. Canby

By /s/
David J. Euchner

This comment e-filed this date with:

Supreme Court of Arizona
1501 West Jefferson
Phoenix, AZ 85007-3329

Copies of this Comment
Mailed this date to:

David Byers
Administrative Office of Court
1501 West Washington Street
Phoenix, AZ 85007-3327

Richard Coffinger, Petitioner
6838 N. 58th Dr.
Glendale, AZ 85301